

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1994 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed : NO  
to see the judgements?
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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HARIDARASHAN CO.OP.HSG.SOC.LTD

Versus

SOMCHAND MOTIRAM BHAVSAR  
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Appearance:

MR PK JANI for Petitioner  
MR PK PAREKH for Respondent No. 1  
NOTICE SERVED for Respondent No. 2  
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CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 08/12/2000

ORAL JUDGEMENT

The appellant who is the defendant no. 3 has  
challenged the judgment and order dated 29.3.1985 passed  
in Special Civil Suit No. 121/1980 by the learned 2nd  
Jt. Civil Judge (SD) at Narol, whereby the learned trial

judge was pleased to pass a decree directing the defendants no. 1 to 3 shall jointly and severally pay the amount of Rs. 73,675-40ps. together with costs and interest at the rate of 12% per annum from the date of the suit till realisation.

The facts giving rise to the present proceedings as under:

The plaintiff is doing the business for printing materials by the names and style of M/s. S.H. Bhavsar & Co. He is the sole proprietor of the said firm. The defendant no. 4 is the brother of the plaintiff, who died during the pendency of the suit and, therefore, legal heirs of defendant no. 4 was brought on record. The plaintiff and defendant no. 4 are the co-owners of the land bearing survey no. 282/1 and 282/2 situated at village Ranip, Tal. City & Dist. Ahmedabad. It is the case of the plaintiff that the defendant no. 1- society had shown their willingness to purchase the suit land from the plaintiff and the defendant no. 4, at the rate of Rs. 15/ per sq. yrds. Accordingly, the earnest deed was also executed by the plaintiff and defendant no. 4 in favour of the defendant no. 1-society. On 27.2.1974, three separate sale-deeds were executed by the plaintiff and the defendant no. 4 in favour of defendant no. 1 society. All the above three sale-deeds were duly registered before the Registrar, Ahmedabad. The sale-deed bearing Registration NO. 532 was executed in respect of the land admeasuring 2628 sq. yrds. for an amount of Rs. 29,420/. The sale -deed bearing Registration No. 540 is executed in respect of the land admeasuring 2430 sq. yrds. for an amount of Rs. 36,450/ and the sale-deed bearing Registration No. 541 in respect of the land admeasuring 2346 sq. yrds. for an amount of Rs. 35,109/. In all, the defendant no. 1 -society has to make payment of Rs. 93,650/ to the plaintiff as well as to the defendant no. 4. It is the case of the plaintiff that at the time of the executing the aforesaid sale-deeds, the financial position of the defendant no. 1's society was not sound, and, therefore, they were not able to pay the consideration of the suit lands. The defendant no. 1-society has kept charge of the plaintiff and the defendant no. 4 upto the tune of Rs. 93,650/.

It is the case of the plaintiff that he has 1/2 share in the said amount. Since the defendant no. 4, who was the brother of the plaintiff was not taking interest to recover the aforesaid amount from the defendant no. 1-society, the plaintiff filed the suit

against the defendant society to recover 1/2 share from the amount of Rs. 93,650/ and also claimed interest amounting to Rs. 27,045-40ps. at the rate of 12% per annum from the period from 9.1.1976 to 30.10.1980. In the plaint, the plaintiff has also averred that the defendant no. 1 society has transferred some portion of the suit land to defendant no. 2 and 3-societies and, therefore, the plaintiff is also entitled to recover his due amount from all the societies.

The concerned defendants appeared in the suit and by filing the reply, disputed the claim made by the plaintiff.

On behalf of the plaintiff, Somchand Motiram Bhavsar, PW-1, Ex. 62 and on behalf of the defendant no. 4, Anil Mahasukhram Bhavsar, DW-1, Ex. 86 were examined. Appreciating the said evidence, the learned trial judge has, as stated above, passed the decree against the defendants no. 1 to 3 for an amount of Rs. 73,675-40ps with 12% interest, which is under challenge in the present appeal.

Mr. PK Jani learned counsel appearing for the appellant-defendant no. 3, submitted that the trial court has not properly appreciated the oral as well as documentary evidence adduced in the case. He submitted that the entire proceedings are virtually an ex-parte proceedings inasmuch as no opportunity was given to the defendants no. 1 to 3 either to lead oral evidence or to cross-examine the plaintiff as well as plaintiff's witness as well as witness of defendant no. 4. By inviting my attention to the specific grounds raised in the memo of appeal, Mr. Jani submitted that when the evidence of the plaintiff was recorded it was not possible for the defendants no. 1 to 3 and more particularly the defendant no. 3 to attend the court as at that time the city of Ahmedabad and its suburbs were under the turmoil of severe violence. Mr. Jani therefore, submitted that this is a fit case for setting aside the impugned judgment and order. Mr. PK Parekh learned counsel appearing on behalf of the original plaintiff supported the judgment in toto.

On perusing the rojkam, it appears that on 26.2.1985 the deposition of plaintiff's witness (PW-1) Somchand Motiram Bhavsar was commenced. The case was adjourned to 1.3.1985 for recording chief examination of plaintiff's witness. On 1.3.1985, the case was called out in the presence of the advocates of the parties, wherein defendants' advocate gave an application ex. 63

under O. 11, R-15 & O-12, R-7 of Code of Civil Procedure and court fixed those applications for hearing. Consequently, the examination-in-chief of plaintiff's witness no. 1 was also adjourned to 6.3.1985. On 6.3.1985, when the case was called out in the presence of the advocates of the parties, an application ex. 65 was given by the plaintiff's advocate for production of the list and further deposition of plaintiff's witness no. 1 was recorded. It appears from ex. 67 to 78 certain documents were produced. On the same day, an application ex. 79 is filed by defendant no. 4 for adjournment for production and the same was granted and the case was adjourned to 12.3.1985 for the cross-examination of PW-1. On 12.3.1985, when the case was called out in presence of the advocates for the parties, again certain documents were produced. It is stated in the rojkam that the defendants no. 1 to 3 are absent and also the advocate for the heirs is also absent and, therefore, the cross of them is closed. The case is adjourned to 13.3.1985 for the evidence of PW-1. On 13.3.1985, when the case was called out in presence of the advocates and on the same day, the plaintiff's advocate by filing an application ex. 85 declaring of closing of the plaintiff's evidence. The plaintiff's advocate also filed an application for adjournment vide ex. 85/A and the case was adjourned to 16.3.1985 for defendant's evidence. On 16.3.1985 in presence of the advocates for the parties, the case was called out, whereby vide ex. 86, the evidence of defendant no. 4/2's witness no. 1- Anil Mahasukhram was recorded. The said defendant no. 4/2 also filed a pursis ex. 86/A closing further evidence and the case was adjourned to 19.3.1985 for the evidence of defendant no. 3. On 19.3.1985, since the advocates for the parties were not present, the case was adjourned to 21.3.1985 and on 21.3.1985 again on the same ground the case was adjourned to 22.3.1985 and thereafter, the case was adjourned to 27.3.1985 and thereafter it was adjourned to 28.3.1985. On 28.3.1985, the case was called out in the presence of the advocates for the parties and the plaintiff's advocate gave an application ex. 87 for time and the case was adjourned to 29.3.1985 for recording the evidence of defendant no. 3. On 29.3.1985, except defendant no. 3, advocates for the parties were present and it appears that the arguments were heard and the judgment was pronounced in the open court. Perusing the said rojkam, it is clear that the entire trial is over with unnecessary haste. It appears that the concerned advocates for the parties have remained present, however, the concerned parties and more particularly the contesting defendants namely defendants no. 1 to 3 have not remained present right from the day

when the examination-in-chief of the plaintiff was recorded and, therefore, the evidence on behalf of the heirs of defendant no. 4/2's witness was recorded. It is not in dispute that the plaintiff's as well as defendant no. 4/2's witness Anil Mahasukhram have common interest against the defendants no. 1 to 3. Even though the plaintiff's examination-in-chief was recorded on 6.3.1985 and the case was adjourned to 12.3.1985 for the cross-examination, the said right was declared closed on 12.3.1985 itself, even though the case was adjourned to 12.3.1985 to 13.3.1985 for the purpose of recording further evidence of plaintiff. On 13.3.1985, a pursis was filed on behalf of the plaintiff for closing the evidence. Thereafter, on the next date of hearing i.e. 16.3.1985 itself the deposition of DW-1 Anil Mahasukhram was recorded and on the same day a closing pursis was given by the defendants. These facts would clearly go to show that no opportunity was afforded to either of the contesting defendants to cross-examine plaintiff's witness or defendant no. 4's witness. Mr. Parekh learned advocate appearing for the defendants submitted that contesting defendants could have applied for re-calling those witnesses and having failed to do so, it is not open for them to make a grievance.

Perusing the rojakam, it is clear that even though it is stated that the parties advocates are present, but it is not clear as to the advocate for the defendants no. 1 to 3 have in fact remained present or not. The learned trial judge in his judgment, in para-5, has stated that the defendant no. 2 appeared before the court and filed adjournment application at ex.11 on 10.11.1980, but subsequently, they failed to file written statement of the plaint. Similarly, in para-9, the learned trial judge has observed as under"

"I have heard the learned advocate Shri T.C. Shah for the plaintiff and the learned advocate Shri J.C. Trivedi for the defendants no. 4/1 to 4/4. The learned advocate for the defendant no. 3 remained absent. The defendants no. 2 and 3 are also failed to step into the witness box."

Thus, it is not clear that in fact the advocates for the contesting defendants were present on all dates when the case was adjourned frequently. One should not lose sight of the fact that the entire city of Ahmedabad as its suburbs were under the turmoil of severe violence during the period from March to July, 1985. A specific ground has been raised in the appeal memo that under the circumstance, the trial court should not have proceeded

to decide the suit in absence of the defendants and more particularly the appellant herein. It is further stated that the appellant's advocate is residing in the city of Ahmedabad, whereas the appellant and his family members are residing at Ranip, and, therefore, it was not possible to contact each other in the wake of disturbances. Thus, when a specific ground is raised in the memo of appeal for not remaining present during the trial, there is no reason for me to reject the said ground. Under the circumstances, assuming that the advocates for the parties might have remained present at the time of hearing, but in absence of any instructions from the contesting parties, they could not have applied for re-calling of the witnesses. In any case, the grounds stated in the appeal memo is sufficient to hold that the appellants were denied opportunity to lead evidence and to cross-examine the plaintiff's as well as defendant no. 4/2's witnesses. Under the circumstances, this is a fit case for setting aside the judgment and order passed by the trial court.

In the result, this appeal is allowed. The judgment and order dated 29.3.1985 passed by the learned 2nd Joint Civil Judge (SD) Narol in Special Civil Suit No. 121/1980 is set aside. The matter is remanded back to the learned Civil Judge (Senior Division), Ahmedabad (Rural) at Mirzapur with a direction to decide the suit afresh. It is clarified that the learned trial judge shall permit the contesting defendants to cross-examine the witness already examined in the instant case and shall also permit the parties to lead such other and further evidence as necessary. There shall be no order as to costs.

In view of the fact that the suit is of 1980, the trial court shall give top most priority to the suit and to decide the same as early as possible and in any case not later than 20.2.2001. The decretal amount deposited by the appellant pursuant to the order passed by this Court on 19.12.1985 in Civil Application No. 4465/1985 shall be returned to the appellant with accrued interest on his furnishing bank guarantee for the total amount withdrawn by him.

(K. R. VYAS, J.)

mandora/